

May 28, 2004
Joseph DuBray, Jr., Director
Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Ave., NW
Washington, DC 20210

Dear Mr. DuBray:

The Society for Human Resource Management (SHRM) submits these comments to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) in response to the Notice of Proposed Rulemaking (NPRM) delineating a federal contractor's Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes (proposed regulation), which was published in the *Federal Register* on March 29, 2004.¹

The rule proposed by the OFCCP furthers the joint proposal Adopting Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (UGESP) as They Relate to the Internet and Related Technologies (Additional Questions and Answers), which were published in the *Federal Register* on March 4, 2004.² SHRM filed comments on the joint proposal with the Equal Employment Opportunity Commission (EEOC) on May 3, 2004.

STATEMENT OF INTEREST

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 185,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters and members in more than 100 countries.

SHRM's membership comprises HR professionals who work for organizations subject to the compliance and reporting requirements established by federal and state workplace discrimination laws and regulations. In addition, many SHRM members work for federal contractors subject to the requirements of Executive Order 11246 and the other laws and regulations that specifically focus on federal contractors. For these

¹ 69 Fed. Reg. 16446

² 69 Fed. Reg. 10152

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reasons, SHRM has a vested interest in any guidance promulgated by the OFCCP that attempts to clarify UGESP.

SHRM has taken a multi-faceted approach to obtain feedback from its members concerning the OFCCP's proposed regulation. SHRM solicited comments from its members via its web site and through its online news service, *HR News*. SHRM also sought input from its chapters that focus on the HR practices that apply to federal contractors. Additionally, members of the Workplace Diversity and Workforce Staffing and Deployment panels reviewed the proposal and provided their expert opinions.

DISCUSSION

SHRM commends the OFCCP for the proposed four-pronged analysis it developed to determine who should be considered an "Internet applicant" for recordkeeping and reporting compliance purposes. The proposed regulation helps eliminate some of the confusion surrounding the complicated determination of "who is an applicant" under current guidelines. The basis for determining an applicant in the Questions and Answers to Clarify and Provide a Common Interpretation (Original Questions and Answers) of the UGESP was published in 1979. According to Question 15, the UGESP agencies indicate that an applicant is any "person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities." This definition has been a continuous source of confusion to employers, but the significant use of the Internet and other related technologies by individuals has made the definition unworkable from the HR professional's perspective. The process for an individual to submit employment materials has become a relatively easy task and job seekers now have greater access to a broad range of organizations and possible job opportunities than ever before. As a result, the burden of reviewing, recording, tracking, collecting, and maintaining applicant materials and information has increased significantly for HR professionals.

The OFCCP, EEOC, Department of Justice (DOJ), and Office of Personnel Management (OPM) (hereinafter UGESP agencies) make up a task force that was assigned to review the definition of "applicant" for recordkeeping compliance purposes under UGESP. After four years, the UGESP agencies published, in Question and Answer format, a proposed new definition of an applicant for electronic applications that was published on March 4, 2004.³ The proposal adds questions 94 through 98 to questions 1 through 93 that remain unchanged. Unfortunately, as outlined in the comments SHRM submitted in response to the UGESP agencies' proposed new definition (see attached), the Additional Questions and Answers fail to fully address the majority of HR professionals' concerns for determining an applicant for compliance with recordkeeping requirements.

The OFCCP's proposed regulation will help HR professionals determine who is an applicant for recordkeeping compliance; however, they too fail to address all HR

³ 69 Fed.Reg. 10152

professionals' concerns. First, the proposed regulation will force HR professionals to develop and abide by multiple recordkeeping standards; second, the term "advertised, basic qualifications" is vague and contravenes common usage of the term "minimum qualifications" by employers; and, third, the proposed regulation does not provide guidance to HR professionals on how a job seeker's race, ethnicity, and gender information should be obtained as required under UGESP.

I. The Information Collection Requirements in the Proposed Regulation Will Require HR Professionals To Develop Multiple Recordkeeping Standards

A. OFCCP's criteria v. UGESP agencies' criteria for Internet applicant

The Additional Questions and Answers state that each UGESP agency can "provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities." The OFCCP's proposed regulation stems from that directive. SHRM believes the OFCCP's proposed regulation provides HR professionals with practical guidance when determining who is an Internet applicant. Portions of the UGESP agencies' proposal are also helpful to HR professionals determining who is an applicant. Unfortunately, the criteria outlined by the UGESP agencies for defining an applicant who has indicated interest for employment through the use of the Internet or related technologies differs from the OFCCP's criteria for defining an Internet applicant. Certainly, this will make implementation for HR professionals who must deal with multiple federal agencies difficult and inconsistent. SHRM suggests that the final regulation represent portions of each proposal to create a unified proposal that provides clear direction and guidance to employers.

An Internet applicant, in the OFCCP proposal, is one who "has submitted an expression of interest in employment" and who the employer then considers for employment in a specific position. This implies that a job seeker could have an interest in a specific job or in any job the employer identifies as matching the job seeker's skills. SHRM endorses the narrower approach used in the UGESP agencies' proposal, which considers an applicant to be one who "has indicated interest in the specific position" for which an employer has acted to fill.

To be an applicant for recordkeeping purposes, the UGESP agencies' proposal requires only that the job seeker follow the employer's standard procedures for submitting an application, yet does not address the issue of minimum qualifications. SHRM prefers the OFCCP's proposal that a job seeker is not considered an Internet applicant unless his or her expression of interest indicates that he or she possesses the basic qualifications that an employer determines to be considered for the position. The OFCCP's proposal also requires that the basic qualifications be noncomparative, job-related and objective.

SHRM strongly encourages the OFCCP to work with the other UGESP agencies in an effort to establish formal regulations that will provide a clear, consistent set of

guidance with which HR professionals can comply. SHRM suggests that the final guidance incorporate prongs from both the OFCCP's proposed regulation and the UGESP agencies' proposed Questions and Answers to develop a practical formula for HR professionals to use to comply with Federal recordkeeping requirements.

B. Internet applicants v. traditional applicants

As noted above, the OFCCP's proposed regulation provides some practical guidance with regard to who should be considered an Internet applicant. In particular, the four-part test advanced by the proposed regulation should be a useful tool for HR professionals to determine which job seekers can, and should, be considered Internet applicants for UGESP recordkeeping requirements. Unfortunately, the proposed regulation will not impact the traditional application process, and HR professionals will have to continue to comply with the overly broad and unworkable current standard that will remain for job seekers who submit paper materials by mail or in-person. The OFCCP's proposed rule, like the UGESP agencies' proposed regulation, creates different standards for data collection of traditional applicants compared to data collection of Internet applicants, even for applications received for the same position if the recruitment process for that position involves both the Internet and traditional recruitment mechanisms such as classified advertisements requiring mailed paper submissions. In response to the OFCCP's specific request to solicit feedback on the dual standard created by the proposed regulation, SHRM offers the following comments.

The definition of an applicant for job seekers who use the paper-based job seeking approach for both OFCCP and the other UGESP agencies' enforcement activities will remain anyone interested in employment who submits a written application, notice, or resume regardless of whether an available position exists or if the person for the position is even qualified for the position. The OFCCP's proposed regulation however does narrow the standard for Internet applicants to those who express interest in employment via the Internet, who are considered for a particular open position, and who possess the basic qualifications for the position. By failing to apply the proposed regulation to traditional forms of recruitment and job-hunting, OFCCP will create the potential for HR professionals and OFCCP officers to interpret their compliance duties in a varied and inconsistent manner.

Tracking applicants based on the Original Questions and Answers for paper-based applications, as well as a second standard as outlined in the proposed regulation for Internet applications, is an administrative burden that will be onerous, unreasonable, and confusing. If the proposed regulation is adopted in its current form, HR professionals would be left in an untenable position of being forced to comply with different and inconsistent sets of recordkeeping requirements. For one position where both Internet applicants and traditional applicants express interest, HR professionals would be required to distinguish between the methods in which the application materials are received to determine who should appear on applicant logs and who should then be surveyed for race, gender, and ethnic information. Because the standard used for traditional applicants is broad and expansive, HR professionals will be required to give unqualified candidates

who express interest through traditional means consideration for an open position for which unqualified Internet applicants would not be considered. Invariably, job seekers will be treated differently and HR professionals will be required to explain and justify the inconsistent treatment of applicants to Compliance Officers from the OFCCP during regulatory reviews. This approach runs counter to the ethics of HR professionals who strive to treat all individuals fairly. Additionally, it will create an inequity in the hiring process that will likely give rise to disparate impact claims and will fail to further the purposes of the UGESP to eliminate discrimination from the workplace. Last, but certainly not least, maintaining different tracking requirements for job applications could also cause an employer to run afoul of Executive Order 11246 and possibly risk debarment from federal contracts.

HR professionals could be forced to take measures that present additional problems from an administrative and HR perspective. For instance, employers could eliminate the use of paper applications and resumes in favor of the new standard designed for the Internet and related technologies which may conflict with other federal regulations, such as those covering veterans (see discussion below). Eliminating paper applications and resumes will ultimately have a negative impact on disadvantaged populations that have no or irregular access to computers and the Internet. Alternately, HR professionals might use the standard found in the proposed regulation for all types of recruitments. However, this will present significant legal problems during regulatory reviews by OFCCP, as HR professionals' conduct in the hiring process will be in conflict with the OFCCP's requirements.

There is one additional factor that suggests that OFCCP should apply one consistent definition of applicant for all job seekers.⁴ The regulations that call for the affirmative recruitment of veterans require federal contractors and subcontractors to use state employment services (SES) as a recruitment source for almost all open employment positions.⁵ Many applicants who learn about openings from SES submit traditional application forms through the mail or at company sites. However, SES also publishes all openings on the Internet, and individuals also submit application materials over the Internet. Since the use of SES is an absolute requirement under OFCCP's regulations covering veterans, HR professionals would be placed in an untenable situation, as certain SES applicants would potentially be treated differently from other SES applicants for no other reason than the method used to apply for a position.

SHRM suggests that the proposed regulatory definition apply to both Internet and the traditional application processes and that OFCCP and the UGESP agencies develop one set of uniform regulations.

⁴ 41 CFR 60-250.5

⁵ 41 CFR 60-250(a)2

II. The OFCCP's Proposed Regulation Requiring Internet Applicants To Possess the Advertised, Basic Qualifications Is Vague and Contravenes the Common Usage of the Term "Minimum Qualifications"

In the recruitment process, HR professionals require job seekers to meet the minimum qualifications of the specific open position that they seek to fill. As noted above, under the OFCCP proposal, a job seeker can only be deemed an "applicant" if he or she possesses the "advertised, basic qualifications." SHRM applauds the OFCCP for recognizing the importance of an "applicant" being one who possesses the basic qualifications for a position and believes this is a step in the right direction. However, SHRM has some concern with the use of the term "basic qualifications" as opposed to "minimum qualifications," which is the common or more acceptable term used in the employment process by HR professionals and employers.

SHRM suggests that the word "minimum" replace the word "basic" in the final regulations. HR professionals frequently discuss the necessity of finding applicants that have the minimum qualifications for positions. The word "basic," however, is much more nebulous, and may, in some cases, suggest a broader standard for who should be considered an applicant than OFCCP intends. At the same time, the word "basic" may potentially suggest to some employers and OFCCP Compliance Officers that individuals should be considered applicants even if they do not meet a minimum level of skill and experience, but instead meet some ill-defined "basic" level of qualifications. Many job postings and internal job descriptions use the term "minimum qualification," and, by using that same term, it would be more consistent and clear to HR professionals and OFCCP compliance officers alike that individuals are to be considered applicants when they have a clearly defined level of skills and experience that allow the individual to meet the minimum qualifications of a position.

Additionally, SHRM is troubled with the OFCCP's use of the term "advertised." According to the proposed regulation, advertised, basic qualifications are those that an employer advertises to potential applicants that they must possess in order to be considered for the position. The OFCCP's proposal states that the basic qualifications must be advertised, but the term "advertised" is vague, and the proposed regulation fails to provide guidance on how it should be applied or how the qualifications should be advertised. Also, the term "advertised" in the proposal implies that the qualifications must be pre-determined by the employer and publicly communicated to job seekers so they are aware of them at the time they review and apply for the position. This proves to be problematic under the proposed standard, because job seekers need not apply for a specific open position; instead they only need express interest in employment and therefore would not necessarily know of the minimum qualifications for a job when they express general interest in employment.

SHRM recognizes the importance of having established, business-related job qualifications when the process of recruiting and selecting applicants for open positions commences. The method of communicating such qualifications can take many forms including verbal (e.g., through networking) and various written forms. As the need

fluctuates, so may the methods of communication. Qualifications could be erroneously “advertised” through no fault of the company. For example, a recruitment advertisement or job posting could omit a significant qualification of the position. SHRM contends that “advertised” can be ambiguous and open to interpretation. SHRM suggests that the term “established” replace the word “advertised.” In this sense, job seekers who possess the minimum qualifications determined necessary for the position would be considered Internet applicants, but persons who do not meet the established minimum qualifications would not be considered Internet applicants.

III. The Information Collection Requirements in the Proposed Regulations Do Not Provide Guidance to HR Professionals on How the Information Regarding the Job Seeker’s Race, Ethnicity, and Gender Should Be Obtained for Job Seekers Who Apply Through the Internet or Related Technologies

Under UGESP, employers must maintain and have available for inspection records and supporting data of all applicants to determine whether a company’s hiring and recruitment practices have an adverse impact on minorities and women. Under the current standard, employers must solicit the race, gender, and ethnic information where possible of all applicants. SHRM has never questioned that the race, gender, and ethnic information of applicants need be obtained, but it has always been a question by the Society as to when, and how, to obtain the needed information.

From SHRM’s perspective, employers should gather race, ethnicity, and gender information presented to them either through visual observation or self-identification. HR professionals were optimistic that the UGESP agencies’ and the OFCCP’s guidance would provide some clarification and concrete guidance in regard to the collection of race, ethnicity, and gender information on applicants. Unfortunately, the proposed regulation, like the regulation proposed by the UGESP agencies, provides no meaningful information or guidance on how, or when, employers must solicit or gather the race, gender, and ethnicity of Internet applicants. The OFCCP’s newly proposed regulation requires only that employers obtain the race, gender, and ethnic information where possible of the job seekers who meet the four-prong test for being considered an Internet applicant. Thus, the proposed regulation continues to require federal contractors to obtain information, where possible, on the gender, race, and ethnic information of both traditional and Internet applicants.

Solicitation of this information will be a time- and labor-intensive proposition. The relative anonymity of the Internet prevents HR professionals from learning various details of job seekers submitting resumes, including their race and ethnicity, as well as their gender within a degree of accuracy. None of this information is usually forthcoming from resumes submitted via the Internet; therefore, employers will be forced to collect race, gender, and ethnicity data during various points in the selection process. This will pose a great expense to employers, both in economic and personnel terms, should they be forced to solicit race, gender, and ethnicity data from all Internet applicants. In order to gather gender, race, and ethnic information on all Internet applicants, employers may be

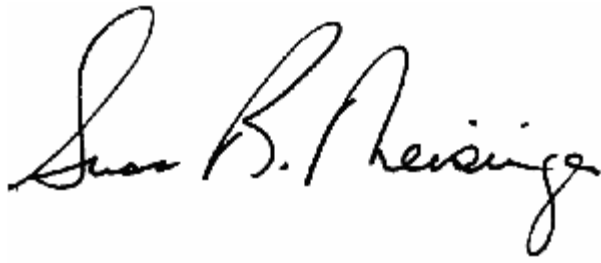
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required to overhaul and develop HR systems at significant time and expense and to hire additional personnel to monitor the process. SHRM suggests that the proposed regulation address how and when HR professionals shall obtain a job seekers' race, ethnicity, and gender information and limit collection of this information to visual observation or self-identification in the recruitment process.

CONCLUSION

SHRM appreciates the opportunity to submit these comments. Should you have any questions, please contact me at (703) 535-6001 or Wendy Wunsh, Manager of Employment Regulation, via e-mail at wwunsh@shrm.org or by phone at (703)-535-6061.

Sincerely,

A handwritten signature in black ink, reading "Susan R. Meisinger". The signature is fluid and cursive, with the first name "Susan" and last name "Meisinger" clearly legible.

Susan R. Meisinger, SPHR
President and Chief Executive Officer

Cc: Cari M. Dominguez, Chair, Equal Employment Opportunity Commission

May 3, 2004

Frances M. Hart
Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
1801 L Street, NW
Washington, DC 20507

Dear Ms. Hart:

The Society for Human Resource Management (SHRM) welcomes the opportunity to provide comments to the Equal Employment Opportunity Commission (Commission or EEOC), the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), the Department of Justice (DOJ), and the Office of Personnel Management (OPM) on their joint proposal adopting additional questions and answers to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures (UGESP) as they relate to the Internet and related technologies, which was published in the *Federal Register* on March 4, 2004, at 69 Fed. Reg. 10152.

STATEMENT OF INTEREST

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource (HR) management. Representing more than 180,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 500 affiliated chapters within the United States and members in more than 100 countries.

SHRM's membership comprises HR professionals who provide human resource expertise to the organizations they represent, many of which are subject to the compliance and reporting requirements established by federal and state workplace discrimination laws and regulations. SHRM members are fully committed to meeting these requirements, including affirmative action compliance and recordkeeping. Therefore, it is important for them to fully understand how to determine who must be considered an applicant for purposes of recordkeeping to ensure that their organizations' selection procedures do not have an adverse impact on women and minorities. For these reasons, SHRM has a vested interest in any guidance promulgated that attempts to clarify how UGESP applies in the context of the Internet and related technologies.

INTRODUCTION

After four years and nine extensions, the federal agencies responsible for UGESP have proposed the “Adoption of Additional Questions and Answers To Clarify and Provide a Common Interpretation of the Unified Guidelines on Employee Selection Procedures as They Relate to the Internet and Related Technologies” (Additional Questions and Answers). The proposed Additional Questions and Answers are a positive step toward identifying who should be deemed an applicant for recordkeeping purposes. SHRM appreciates this opportunity to comment.

SHRM, on behalf of its members, has worked diligently to help with the development of a new definition. As early as 1996, SHRM developed informational documents for our members on this topic to explore the issue and offer suggestions to improve our members’ understanding of how an applicant is defined. In 2000 when the Office of Management and Budget (OMB) instructed the EEOC, in cooperation with OFCCP, DOJ, and OPM, to evaluate the need for clarifying UGESP in light of the growth of Internet usage, SHRM consulted with the UGESP agencies to address the challenges that HR professionals face when attempting to comply with UGESP. In 2003, the SHRM Board adopted a position (attached).

SHRM has taken a multi-faceted approach to garner input from its members to respond to the proposed Additional Questions and Answers. SHRM solicited comments from its members via its web site and through its online news service, *HR News*. In March 2004, SHRM conducted a survey to obtain information from its members concerning their thoughts and comments regarding the proposed Additional Questions and Answers, and 271 HR professionals responded to the poll. Additionally, members of SHRM’s Technology and HR Management, Workplace Diversity, and Workforce Staffing and Deployment panels reviewed the proposal and provided their expert opinions.

DISCUSSION

The question of who must be considered an applicant has troubled HR professionals for many years and for various reasons. One reason is that not one of the agencies responsible for administering the UGESP (UGESP agencies) have specifically defined “applicant” within their regulations. Instead, it appears that the agencies follow the definition located within the Questions and Answers to Clarify and Provide a Common Interpretation of the UGESP published in 1979 (Original Questions and Answers). For example, in response to Question 15, the UGESP agencies indicate that an applicant is any “person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities.”

Another reason HR professionals are concerned with the definition of “an applicant” is that the advent of the Internet and other related technologies has given potential applicants greater access to organizations and job opportunities, making the process of submitting employment materials a relatively easy task. As a result, the

burden of reviewing, recording, tracking, collecting, and maintaining applicant materials and information has increased significantly.

In 2000, the EEOC and the other UGESP agencies were instructed to evaluate the need for changes to the Questions and Answers accompanying the UGESP in light of the significant growth of the Internet as a job-searching tool. After much deliberation, the UGESP agencies have now proposed Additional Questions and Answers to address the Internet and related technologies.

Unfortunately, the proposed Additional Questions and Answers fail to fully address HR professionals' concerns for determining who is an applicant. As a result, SHRM has four primary issues with the proposed Additional Questions and Answers: First, the proposed Additional Questions and Answers will force HR professionals to develop multiple recordkeeping standards; Next, the proposed Additional Questions and Answers do not state that an applicant is one who meets the stated minimum qualifications for a specific open position; Third, the proposed Additional Questions and Answers do not provide guidance to HR professionals on how a job seeker's race, ethnicity, and gender information should be obtained; and Last, the question and answer format is not as binding as formal guidance.

I. The Information Collection Requirements in the Proposed Additional Questions and Answers Will Require HR Professionals To Develop Multiple Recordkeeping Standards.

SHRM anticipated a document that would apply to all individuals seeking employment—via the Internet or other means—as well as a document that would clarify from whom, and how, HR professionals needed to obtain information on race, ethnicity, and gender. As mentioned above, the UGESP agencies have not defined applicant in their regulations nor have they previously offered final guidance. The only direction to how the government analyzes who is an applicant is from the Original Questions and Answers, which state, “the concept of an applicant is a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities.” Under this definition any person who seeks employment and submits a written application, notice, or resume is an applicant. HR professionals believe such a definition is overly broad and burdensome and fails to focus on a specific open position or the minimum qualifications necessary for that position.

The proposed Additional Questions and Answers provide some practical guidance in regard to who should be considered an applicant when materials are submitted through the Internet. In particular, the three-part test advanced by the proposed Additional Questions and Answers should be a useful tool for HR professionals in determining which job seekers can and should be considered applicants for UGESP recordkeeping requirements. Unfortunately, the proposed Additional Questions and Answers will not impact the traditional application process, and HR professionals will continue to have to comply with the overly broad and unworkable current standard that will remain for job seekers who submit paper materials by mail or delivery.

Therefore the proposed Additional Questions and Answers clearly create a different standard with which HR professionals will have to comply for job seekers who use the Internet. The standard for job seekers who use the traditional job seeking approach will remain anyone interested in employment who submits a written application, notice, or resume. By failing to apply the proposed Additional Questions and Answers to traditional forms of recruitment and job-hunting as the proposal does for Internet and related technologies, UGESP will create the potential for HR professionals to interpret their compliance duties in a varied and inconsistent manner.

Tracking applicants based on the Original Questions and Answers for paper-based applications, as well as a second standard as outlined in the proposed Additional Questions and Answers for Internet applications, is an administrative burden that is both onerous and unreasonable. If the proposed Additional Questions and Answers were adopted in their current form, HR professionals would be left in an untenable position of not being able to comply with the differing recordkeeping requirements. In addition, HR professionals could be forced to take measures that present problems from an administrative and HR perspective. For instance, employers could eliminate the use of paper applications and resumes in favor of the new standard designed for the Internet and related technologies. This will ultimately have a negative impact on disadvantaged populations that have no or irregular access to computers and the Internet. Another approach HR professionals might take is to use the standard found in the proposed Additional Questions and Answers for all types of recruitments. However, this would lead to conflicts with regulatory agencies and employers, potentially violating Title VII of the Civil Rights Act of 1964, as amended. HR professionals could use the two conflicting standards, but there would surely be confusion about what to retain and record, especially in the situation where both paper and electronic applicant materials were collected. SHRM suggests that the proposed Additional Questions and Answers apply to both Internet and traditional application processes.

II. The Information Collection Requirements in the Proposed Additional Questions and Answers Do Not Explicitly State That an Applicant Is One Who Meets the Stated Minimum Qualifications for a Specific Open Position.

- A. The proposed Additional Questions and Answers add an explicit procedural requirement to follow an employer's standard procedure, but they do not explicitly require the job seeker to be minimally qualified for a specific open position.

In the recruitment process, SHRM members require job seekers to meet the minimum qualifications of the specific open position that they seek to fill. Unfortunately, the applicant standard enumerated in the proposed Additional Questions and Answers fails to explicitly require that job seekers meet the minimum qualifications to be considered an applicant. In fact, the proposed Additional Questions and Answers require that job seekers follow an employer's procedural requirements to be considered an applicant, but stay silent regarding the need of the job seekers to meet the minimum qualifications when applying for a specific open position. SHRM applauds the UGESP

agencies for requiring a job seeker to follow an employer's standard procedures to be considered an applicant. The standard, however, falls short of addressing all of HR professionals' concerns when defining an applicant for purposes of recordkeeping requirements.

For example, if an employer is seeking to fill a physician's assistant position, and a hairdresser with no college degree, related education or experience opts to apply for the job and follows the employer's standard procedures necessary for submitting his or her application, he or she will be considered an applicant even though he or she does not meet the minimum requirements to be a physician's assistant. This may be an extreme example, yet on a regular basis in the recruitment process job seekers apply for jobs for which they are not qualified, even minimally. Tracking information on individuals who fail to meet the minimum qualifications necessary for the position will place an administrative burden on HR professionals, and will skew the statistics concerning the truly available pool of applicants. Distorted statistics and unrelated information will fail to provide an accurate picture of an employer's recruitment and selection practices.

- B. The proposed Additional Questions and Answers create a dichotomy that would allow HR professionals to recruit qualified individuals from a database without retaining their application materials, but would require application materials to be retained from job seekers, who, even if not qualified, submit a resume for a specific open position.

There are a great number of individuals who submit their resumes to job banks, but not for specific positions. Question 97 of the proposed Additional Questions and Answers allows HR professionals to search job banks and resume databases for candidates with the minimum qualifications without requiring the HR department to track all resumes in the database. However, if an individual expresses interest in a particular position through the mail or through submission of paper materials, the rules change and even job seekers who do not possess the minimum qualifications necessary for the job become applicants.

HR professionals should be entitled to create applicant pools of minimally qualified individuals, whether applicant materials are secured from the Internet or other sources without having to track job seekers who do not possess the minimum qualifications. In the proposed Additional Questions and Answers, the UGESP agencies recognize that the Internet brings "scope and speed" to job seekers and enables "broad" audiences to view job postings. "Broad" includes both qualified and unqualified applicants. HR professionals should be able to weed out individuals who do not possess the minimum qualifications, whether they are found on a job posting board, submit resumes through e-mail, provide resumes through the mail, or fill out applications in person. SHRM believes that tracking job seekers, who do not possess the minimum qualifications and thus are ineligible for the position, will produce statistics that will not accurately represent employers' applicant pools.

The different recordkeeping requirements that apply to job seekers applying for a specific open position and those that submit a resume to a job database may not have a huge impact on larger companies that can potentially afford to cull through large databases, but its effect on small business will be devastating. Small companies lack the resources, both financial and personnel, necessary to rely on Internet job sites and will, therefore, likely post most jobs on their own sites. They will then have to track the documents of all individuals who submit resumes, whether they possess the minimum qualifications or not. SHRM suggests that the proposed Additional Questions and Answers expressly state that a job seeker must meet the employer's minimum qualifications for the relevant position in order to be an applicant for the purposes of UGESP.

III. The Information Collection Requirements in the Proposed Additional Answers and Questions Do Not Provide Guidance To HR Professionals on How the Information Regarding the Job Seeker's Race, Ethnicity and Gender Should Be Obtained.

The proposed Additional Questions and Answers provide "guidance about when employers should identify the race, gender and ethnicity of their applicant pool when they use the Internet and related technologies." However, there is no meaningful information or guidance on how, or when, employers must identify the race, gender, and ethnicity of applicants. Under UGESP, employers must maintain and have available for inspection records and supporting data of all applicants to determine whether a company's hiring and recruitment practices have an adverse impact on minorities and women. The introduction to the proposed Additional Questions and Answers acknowledges the Internet is "relatively anonymous." SHRM agrees. The relative anonymity of the Internet prevents HR professionals from learning various details of job seekers submitting resumes, including their race and ethnicity, as well as in many instances their gender. Since none of this information is forthcoming from resumes submitted via the Internet, employers will be forced to collect race, gender, and ethnicity data during the selection process. The proposed Additional Questions and Answers, therefore, imply that race, gender, and ethnicity data should be solicited from all applicants. However, other UGESP agencies, such as the OFCCP, use a different standard in this regard, asking for race, gender, and ethnicity data on applicants "where possible." There has also been informal guidance on various occasions from UGESP agencies regarding the methods that can, and must be used to gather race, ethnicity, and gender information. HR professionals continue to be concerned about what methods are mandatory and what methods are allowed to gather this sensitive information.

The Original Questions and Answers also fail to provide direction to employers on how to collect applicants' race, ethnicity, and gender information, and SHRM has always contended that this requirement does not involve employer solicitation of race, ethnicity, and gender information. Rather, from SHRM's perspective, employers should maintain information presented to them either through visual observation or self-identification. HR professionals were optimistic that the new guidance would provide

some clarification and concrete guidance in the collection of race, ethnicity, and gender information of applicants.

The proposed Additional Questions and Answers, however, provide no further instruction on whether, or when, race, ethnicity, and gender information must be solicited or gathered. Solicitation of this information will continue to be a time-and labor-intensive proposition, especially since the proposed Additional Questions and Answers fail to expressly exclude non-qualified individuals as applicants. Should organizations be required to obtain race, ethnicity, and gender information on all individuals who submit resumes, including those that do not possess the minimum qualifications, HR professionals will be forced to collect this sensitive information without any direction, guidance or recommendations from the UGESP agencies on methods to do so without violating federal and state nondiscrimination laws. SHRM suggests that the proposed Additional Questions and Answers address how and when an HR professional shall obtain a job seeker's race, ethnicity, or gender information and how it can be reconciled with OFCCP requirements for both paper and Internet applicants.

IV. SHRM Has Concern That the Question And Answer Format Lacks the Influence of Formal Guidance.

The UGESP requirements defining an applicant have purportedly confused HR professionals for years, because they were issued in question and answer format as opposed to being formal regulations. When the UGESP agencies were called upon to address an applicant in the age of the Internet, SHRM was encouraged that the UGESP agencies would issue formal regulations to address issues such as the definition of applicant and recruitment in the age of the Internet. Instead, the UGESP agencies provided an additional set of proposed Questions and Answers. SHRM appreciates that the agencies have issued proposed Additional Questions and Answers; however, HR professionals still have concerns, because the questions and answers lack the influence of formal regulations and will continue to leave many issues unanswered. HR professionals, applicants, regulatory officials, and a multitude of other individuals rely on regulatory standards to help them evaluate their actions and decisions. The lack of a formal regulatory standard on the definition of applicant has led to many problems during regulatory reviews, discrimination complaints, and other governmental actions. In light of the huge impact the lack of a definition has caused, a formal regulation on this point, rather than a series of Questions and Answers, would be most welcome.

Furthermore, the proposed Additional Questions and Answers allow for each UGESP agency to "provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities." This will lead to multiple standards and thus cause even more confusion among the various stakeholders. The OFCCP has already drafted and published proposed regulations in this regard, to which SHRM will be submitting comments. Different regulations or other guidance from the EEOC and the other UGESP agencies will create a more difficult situation for HR professionals than now exists by providing conflicting or inconsistent guidance. Therefore, SHRM requests that the

agencies work together in an effort to establish formal regulations that will provide clear and consistent guidance with which HR professionals can comply.

CONCLUSION

SHRM appreciates the opportunity to submit these comments. Should you have any questions, please contact me at (703) 535-6001 or Wendy Wunsh, Manager of Employment Regulation, via e-mail at wwunsh@shrm.org or by phone at (703)-535-6061.

Sincerely,

A handwritten signature in black ink, reading "Susan R. Meisinger". The signature is fluid and cursive, with the first name "Susan" and last name "Meisinger" clearly legible.

Susan R. Meisinger, SPHR
President and Chief Executive Officer